(32,794)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927

No. 342

KRAUSS BROTHERS LUMBER COMPANY, PETITIONER,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT, ETC.; MOBILE & OHIO RAILROAD COMPANY AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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COMPLAINT

Filed March 20, 1923

Chas. J. Allison, Clerk.

UNITED STATES OF AMERICA

DISTRICT COURT OF THE UNITED STATES

For the Northern District of Alabama, Southern Division

The President of the United States of America to the Marshal of said District—Greeting:

You are hereby commanded to summon JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS AS AGENT, under and by virtue of Section 206 Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a corporation, engaged in interstate commerce and subject to Interstate Commerce Act, to appear before the Honorable District Court aforesaid, at the place of holding said Court at BIRMINGHAM, ALA., on the first Monday of September next, to answer the complaint of KRAUSS BROTHERS LUMBER COMPANY, who is citizen of the State of Louisiana, and have you then and there this writ.

Witness, the HON. W. I. GRUBB, Judge of the District Court of the United States for the Northern District of Alabama, this 20th day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-Three.

Issued the 20th day of March, in the year of our Lord, One Thousand Nine Hundred and Twenty-Three.

Attest: CHAS. J. ALLISON,
Clerk U. S. District Court, Northern District of Alabama.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORHERN DISTRICT OF ALABAMA

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff.

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

COUNT ONE.

Plaintiff claims of the defendants two thousand eight hundred ninety-four (2894) dollars for money on the first day of June, 1918, received by defendants to the use of the plaintiff, which sum of money, with the interest thereon at the rate of six (6) per cent. per annum, is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorneys as provided by statute.

Said claim is based upon facts which are more particularly set out in that certain report and order of the Interstate Commerce Commission, a full, true and correct copy of which is hereunto atached, marked "Exhibit A," and is hereby expressly made a part of this count.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, Louisiana. The defendants, as railroad common carriers engaged in interstate commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917, and January 12, 1918, originally billed to Meridian, Mississippi, Jackson and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT TWO.

Plaintiff claims of the defendants four thousand five hundred thirty (4530) dollars for money on the first day of July, 1918, received by defendants to the use of the plaintiff, which sum of money, with the interest thereon at the rate of six (6) per cent. per annum, is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorneys, as provided by statute.

Said claim is based upon facts which are more particularly set out in that certain report and order of the Interstate Commerce Commission, a full, true and correct copy of which is hereunto attached, marked "Exhibit A," and is hereby expressly made a part of this count.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, Louisiana. The defendants, as railroad common carriers engaged in interstate commerce and subject to the Interstate Commerce Act, unlawfully collected demur-

rage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917, and January 12, 1918, originally billed to Meridian, Mississippi, Jackson and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT THREE.

Plaintiff claims of the defendants two thousand nine hundred thirty-two (2932) dollars for money on the 20th day of March, 1918, received by defendants to the use of the plaintiff, which sum of money, with the interest thereon at the rate of six (6) per cent. per annum, is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorneys as provided by statute.

Said claim is based upon facts which are more particularly set out in that certain report and order of the Interstate Commerce Commission, a full, true and correct copy of which is hereunto attached, marked "Exhibit A," and is hereby expressly made a part of this count.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, Louisiana. The defendants, as railroad common carriers engaged in interstate commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917, and January 12, 1918, originally billed to Meridian, Mississippi, Jackson and Chattanooga, Tennessee, and re-

consigned at those points to numerous destinations north and east thereof. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

BRENTON K. FISK,
JOHNSON & ELKINS,
Attorneys for Plaintiff.

EXHIBIT A

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of November, A. D., 1922.

No. 11881

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11881 (Sub. No. 1)

SAME

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

It appearing, That on March 2, 1922, the commission entered its report in the above-entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further considera-

tion on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question; we find that complainant is entitled to awards of reparation from the defendants named in the following table in the amounts set opposite their respective names, with interest:

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorizd and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28, 1922, the amounts set opposite their respective names in said table, with interest thereon at the rate of 6 per cent. per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission:

GEORGE B. McGINTY,
Secretary.

(SEAL)

EXHIBIT A—Continued

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted November 22, 1921. Decided March 2, 1922.

Demurrage and reconsignment charges assessed on carload shipments of lumber reconsigned at Meridian, Miss., Jackson, and Chattanooga, Tenn., found illegal. Reparation awarded.

Harry S. Elkins and Ross H. Johnson for Complainant.

H. L. Walker, Alex M. Bull, and John F. Finerty for Director General of Railroads.

H. L. Walker for Mobile & Ohio Railroad Company.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch, and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1, 1917,

and January 12, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia Ohio, Indiana, and New York, and orders were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being

modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the latter points was for the purpose of evading and nullifying the embargoes. Complainant admits it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment Case, 47 I. C. C. 590, 634; Wood v. N. Y., P. & N. R. R. Co., 53 I. C.

C. 183; Atlantic Lumber Co. vs. N. Y. P. & N. R. R. Co., 57 I. C. C. 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us. The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention of cars when it is not directly responsible for such detention and can not abate the cause thereof, as in the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the

shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

66 I. C. C.

Filed March 20, 1923.

CHAS. J. ALLISON, Clerk.

MARSHAL'S RETURN.

I have executed the within writ on the Ala. Great Southern Railroad Co. by handing a copy thereof to L. Cowan, Agent of said Ala. Great Southern Railroad. On the Mobile & Ohio Railroad Co. by handing a copy thereof to L. Cowan, Agent of said Mobile & Ohio Railroad Co. at Birmingham, Ala. On James C. Davis, Director-General of Railroads, etc., for the Ala. Great Southern Railroad Co. and the Mobile & Ohio Railroad Co. by handing a copy thereof, for each of said Railroads to L. Cowan, Agent for each of said Railroads at Birmingham, Ala.

This the 21st day of March, 1923.

THOS. J. KENNEMER, U. S. Marshal.

By T. J. BROWN, Deputy.

DEMURRER OF DEFENDANTS, DIRECTOR GENERAL OF RAILROADS.

Filed September 17, 1923.

CHAS. J. ALLISON, Clerk.

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, A CORPORATION, Plaintiff,

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER AND BY VIRTUE OF SECTION 206, TRANSPORTATION ACT OF 1920, ET ALS, Defendants.

Comes the defendant, James C. Davis, Director General of Railroads, as Agent under Section 206, Transportation Act, 1920, and for himself alone, demurs to the complaint as filed herein, and to each count thereof, separately and severally, and as grounds of such demurrer, sets out the following, separately and severally:

1. For that said count states no cause of action against this defendant.

2. For that said count claims interest against this defendant, when the Court judicially knows that this defendant is acting as the representative of the United States Government, and therefore, is not liable for such interest.

3. For that said count claims an attorney's fee against this defendant, when the Court judicially knows that this defendant is acting as the Agent of the United States Government, and is not liable for such attorney's fee.

4. For that said Count contains a misjoinder of parties defendant, in that this defendant is joined with certain railroad corporations, when the Court judicially knows that said railroads and this defendant cannot be jointly liable for any amount.

STOKELY, SCRIVNER, DOMINICK & SMITH
Attorneys for the above named defendant, Jas. C. Davis, Director General of Railroads, as Agent under Section 206, Transportation Act, 1920.

AMENDMENT TO COMPLAINT

Filed March 27, 1926.

W. S. Lovell, Clerk.

IN THE DISTRICT COURT OF UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

Comes the plaintiff, and by leave of the court first had and obtained, amends its complaint heretofore filed in this cause by adding thereto Counts Fourt, Five, Six, Seven and Eight, in words and figures as follows:

COUNT FOUR.

Plaintiff claims of the defendants the sum of TEN THOUSAND THREE HUNDRED FIFTY-SIX DOLLARS ($10,356.00) in the amounts hereinafter set out opposite their respective names, with interest thereon, received by the defendants to the use of the plaintiff,

which sums of money with interest thereon are still due and unpaid. Said sum of $10,356.00 is due from the defendants in the sums set opposite their respective names as follows:

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute. The plaintiff's claim is based upon facts which are more particularly set out in those certain reports and orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

EXHIBIT 2.

An order of the Interstate Commerce Commission, dated November 13th, 1922.

EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act to Regulate Commerce, approved February 4th, 1887, and the several acts amendatory and supplemental thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

The foregoing orders of the Commission referred to as Exhibits, Two, Three and Four, and also the order of the Commission dated October 7th, 1924, referred to in Exhibit Five, were filed forthwith with the defendants.

COUNT FIVE.

Plaintiff is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are common carriers engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act "To Regulate Commerce, approved February 4th, 1887," and the several acts amendatory and supplemental thereto. The plaintiff avers that the defendants unlawfully collected demurrage and reconsignment charges on car load shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations to states north and east thereof.

The lumber in question was loaded at the mill with which the complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved to Meridian, Mississippi, and Jackson, Tennessee, over the Mobile & Ohio Railroad; to Chattanooga, Tennessee, over the Alabama Great Southern. These shipments were placed in transit before being sold, and the plaintiff did not know the ultimate destination at the time they were started in shipment.

Prior to the arrival at a later date, at the reconsigning points above enumerated, the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders were transmitted to the defendants, directing reconsignment to the latter points. These orders defendants refused to accept or failed to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment and reconsignment points when the shipments originated. Demurrage and reconsignment charges were assessed against the defendants by the plaintiff under such circumstances. The embargoes were brought about by severe congestion of traffic throughout the eastern portion of the United States during the period in question, and were constantly being modified, cancelled or restored to meet particular emergencies.

The plaintiff caused to be filed with the Interstate Commerce Commission within the time allowed by law a formal complaint, No. 11,881, against the above named defendant common carriers, praying for reparation on account of the aforesaid illegal charges.

After a full hearing and investigation, the Interstate Commerce Commission on or about March 2nd, 1922, found that the aforesaid charges were illegal, and made a formal report to that effect, dated March 2nd, 1922, a copy of which said report is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 1.

Thereafter, on or about November 13th, 1922, the Interstate Commerce Commission entered its formal

order based upon the finding of March 2nd, 1922, a copy of which order is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 2.

Thereafter, on to-wit: April 9th, 1923, the Interstate Commerce Commission entered an order, amending the order of November 13th, 1922, hereinabove referred to, by eliminating from the effect of said order the Alabama Great Southern Railroad Company as a defendant. A copy of said order of April 9th, 1923, is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 3.

Thereafter, on to-wit: May 8th, 1923, the Interstate Commerce Commission further amended the order of November 13th, 1922, as amended, by striking out the award of reparation against James C. Davis, Director General of Railroads, as agent, in the sum of $2,932.00, and in said order of May 8th, 1923, the said Commission undertook to re-open the prceedings in said cause, solely for the purpose of determining against whom, if any one, the award of reparation in the amount of $2,932.00 should be made. A copy of said order of May 8th, 1923, is hereto attached and made a part hereof as if fully set out herein, and identified as Exhibit 4.

In pursuance of said order of May 8th, 1923, the Interstate Commerce Commission undertook upon further hearing in said cause to render a supplemental report dated October 7th, 1924, a copy of which report together with the order thereon, as entered by the Interstate Commerce Commission, is attached hereto and made a part hereof as if fully set out herein, and identified as Exhibit 5.

The plaintiff avers that after the Interstate Commerce Commission had rendered its report of March 2nd, 1922, and entered its order thereon as of November 13th, 1922, as hereinabove mentioned, and within one year thereafter the plaintiff filed this suit in the District Court of the United States for the Northern District of Alabama, the suit being filed March 20th, 1923, and prior to the amendatory findings and orders of the Interstate Commerce Commission, dated April 8th, 1923, May 8th, 1923, and October 7th, 1924, and identified as Exhibits 3, 4 and 5, respectively, and attached hereto and made a part hereof.

WHEREFORE the plaintiff specifically claims of the defendants the amounts set opposite their respective names, with interest thereon from the dates shown.

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

The plaintiff also claims of the defendants a reasonable attorney's fee, as provided by statute.

COUNT SIX.

The plaintiff claims of the defendants TWO THOUSAND EIGHT HUNDRED NINETY-FOUR AND NO-100 DOLLARS ($2,894.00) for money on the 1st day of June, 1918, received by the defendants to the use of the plaintiff, which sum of money with interest thereon at the rate of six per cent per annum is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute.

The plaintiff's claim is based upon the facts which are more particularly set out in those certain reports and orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

EXHIBIT 2.

An order of the Interstate Commerce Commission, dated November 13th, 1922.

EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act "To Regulate Commerce," approved February 4th, 1887, and the several acts amendatory and supplementary thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT SEVEN.

The plaintiff claims of the defendants FOUR THOUSAND FIVE HUNDRED THIRTY AND NO/100 DOLLARS ($4,530.00) for money on the 1st day of July, 1918, received by the defendants to the use

of the plaintiff, which sum of money with interest thereon at the rate of six per cent per annum is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute.

The plaintiff's claim is based upon the facts which are more particularly set out in those certain reports and orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

EXHIBIT 2.

An order of the Interstate Commerce Commission, dated November 13th, 1922.

EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defendant carriers is subject to the Act "To Regulate Commerce, approved February 4th, 1887," and the several acts amendatory and supplemental thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points, to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

COUNT EIGHT.

The plaintiff claims of the defendants TWO THOUSAND NINE HUNDRED THIRTY-TWO AND NO/100 DOLLARS ($2,932.00) for money on the 20th day of March, 1918, received by the defendants to the use of the plaintiff, which sum of money with interest thereon at the rate of six per cent per annum is still unpaid. The plaintiff also claims of the defendants a reasonable fee for its attorney, as provided by statute.

The plaintiff claims is based upon the facts which are more particularly set out in those certain reports and

orders of the Interstate Commerce Commission, full, true and correct copies of which are attached hereto and made a part of this count as if fully set out herein, said reports and orders being identified as follows:

EXHIBIT 1.

Report of the Interstate Commerce Commission, dated March 2nd, 1922.

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EXHIBIT 3.

An order of the Interstate Commerce Commission, dated April 9th, 1923.

EXHIBIT 4.

An order of the Interstate Commerce Commission, dated May 8th, 1923.

EXHIBIT 5.

Supplementary report, together with order of the Interstate Commerce Commission, both of which are dated October 7th, 1924.

The plaintiff further shows that it is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. The defendants are, and each of them is, a common carrier engaged in Interstate Commerce, maintaining offices and operating railroads, the lines of which run into, within and through the Northern District of Alabama, and each of said defen-

dants carriers is subject to the Act "To Regulate Commerce, approved February 4th, 1887," and the several acts amendatory and supplemental thereto. The defendants, as railroad common carriers, engaged in Interstate Commerce and subject to the Interstate Commerce Act, unlawfully collected demurrage and reconsignment charges on carload shipments of lumber shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Mississippi, Jackson, Tennessee, and Chattanooga, Tennessee, and reconsigned at those points to numerous destinations north and east thereof to other states. Plaintiff seeks recovery herein of said unlawful charges wrongfully exacted of it as aforestated.

J. P. MUDD,
Attorney for Plaintiff.

EXHIBIT 1.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISISSIPPI RAILROAD COMPANY, ET AL.

Submitted Nov. 22, 1921. Decided March 2, 1922.

Demurrage and reconsignment charges assessed on carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn., found illegal. Reparation awarded.

Harry S. Elkins and Ross H. Johnson for complainant.
H. L. Walker, Alex M. Bull, and John F. Finerty for Director General of Railroads.
H. L. Walker for Mobile & Ohio Railroad Company.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars

and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the latter points was for the purpose of evading and nullifying the embargoes. Complainant admits that it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoes points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment Case, 47 I. C. C. 590, 634; Wood v. N. Y. P. & N. R. R. Co., 53 I. C. C. 183; Atlantic Lumber Co. v. N. Y. P. & N. R. R. Co., 57 I. C. C. 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us. The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention of cars when it is not directly respon-

sible for such detention and can not abate the cause thereof, as in the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

66 I. C. C.

EXHIBIT 2.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 13th day of November, A. D., 1922.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881. (Sub. No. 1.)

SAME

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

It appearing, That on March 2nd, 1922, the commission entered its report in the above-entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having filed agreed statements with respect to the shipments in question we find that complainant is entitled to awards of reparation from the defendants named in

the following table in the amounts set opposite their respective names, with interest:

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28th, 1922, the amounts set opposite their respective names in said table, with interest hereon at the rate of 6 per cent per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT 3.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of April, A. D. 1923.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11881. (Sub. No. 1.)

SAME

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in this proceeding on November 13th, 1922, authorizing the payment of reparation, be, and it is hereby, amended by eliminating therefrom the Alabama Great Southern Railroad Company as a defendant.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT 4.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 8th day of May, A. D. 1923.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11881 Sub. No. 1.

SAME.

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above-entitled proceeding, and good cause appearing therefor:

It is ordered, that the order entered in this proceeding on November 13th, 1922, as amended by order entered April 9th, 1923, be, and it is hereby, further amended by striking out the award of reparation against James C. Davis, Director General of Railroads, as agent, in the sum of $2,932.00.

It is further ordered, That this proceeding be, and it is hereby, reopened for such further hearing as the

Commission may hereafter direct, solely for the purpose of determining against whom the award of reparation, above referred to, should run and in what amounts.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(SEAL)

A True Copy
(Signed) GEORGE B. McGINTY,
Secretary.

EXHIBIT 5.

INTERSTATE COMMERCE COMMISSION,

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted October 30th, 1923. Decided October 7, 1924

Upon further hearing amended order further modified as to amount of reparation awarded. Original report 66 I. C. C. 637.

Johnson & Elkins and *Harry S. Elkins* for complainant.

John F. Finerty and *Alex M. Bull* for Director General of Railroads, as agent.

REPORT OF THE COMMISSION ON FURTHER HEARING BY THE COMMISSION.

In our original report, 66 I. C. C. 637, we found that demurrage and reconsignment charges assessed on certain carload shipments of lumber reconsigned at Meridian, Miss., and Jackson and Chattanooga, Tenn., were illegal. The original order of reparation contained an item of $2,932 which the Alabama Great Southern and the Director General of Railroads, as Agent, were directed to pay to complainant with interest from March 20th, 1918. This amount of reparation was found due upon 30 carload shipments reconsigned at Chattanooga and was covered by the complaint in No. 11,881 (Sub. No. 1). After the order had been issued attention was directed to the fact that although the Alabama Great Southern was mentioned in the body of the complaint it was not made a party defendant, and had not been served. Accordingly the order was amended so as to eliminate this item therefrom and a further hearing was had solely for the purpose of determining against whom the award of reparation, above referred to, should run and in what amounts.

The 30 carloads were shipped during the period from October 24th to December 27th, 1917. Demurrage in the amount of $2,747 on 29 cars was collected for detentions which occurred prior to Federal control, and $180.00 on one car for detention during Federal control. A reconsignment charge of $5.00 was also collected on this car. All of the shipments were delivered and all the charges were collected by the Director General of Railroad during Federal control. The demurrage and recon-

signment charges of $185.00 collected on the one shipment accrued to the Director General of Railroads and he clearly became liable therefor. The demurrage charges on the other 29 shipments were credited to the Alabama Great Southern. The real question for determination concerns these shipments, and is: Should the Director General of Railroad, as Agent, hereinafter called defendant be required to refund charges illegally collected by the Director General of Railroads after January 1, 1918, for detention prior to Federal control of cars containing shipments subsequently transported in part and delivered by him.

The liability of defendant in actions arising out of Federal control are set forth in Section 206 of the transportation act, 1920, which provides in part:

> (c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President, during the period of Federal control of * * * charges, * * *, which were * * * * in violation of the Interstate Commerce Act, may be filed with the Commission, * * * * against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against whom such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. X X X X X X.

If there is any authority for the award of reparation against defendant it must be found in this provision.

In reference thereto we said in *Terre Haute, Indianapolis & E. T. Co.* v. *Director General,* 77 I. C. C. 658:

> We believe that this provision was intended to cover charges collected for services performed, at least in part, by the director general during Federal control, and that complaints regarding charges collected by the director general, as agent for the carriers, on account of services performed wholly prior to Federal control, should be filed against the carriers themselves. * * * * Our consideration of the complaint will therefore be confined to shipments which were delivered and on which the charges were paid on or subsequent to January 1, 1918.

In that case transportation charges were in issue. In this case in so far as it concerns the shipments which were detained prior to Federal control, demurrage charges are to be considered. Complainant seeks to base defendant's liability on the mere collection of illegal charges during Federal control. It urges that no right of action accrued until the illegal charges were collected and that the damage was inflicted by the Director General of Railroad. It contends also that the demurrage charges were incidental to the through transportation and that as the Director General of Railroads has completed the transportation service the defendant is liable for illegal demurrage collected on the shipments just as much as he would be for the collection of illegal transportation charges.

But demurrage charges are no part of the rate or through charge in effect at the time the shipment is for-

warded from point of origin. *Getz Brothers & Company v. Director General,* 85 I. C. C. 673. Although they may follow the shipment and be collected together with the transportation charges, they are for a distinct and separate service. The Director General of Railroads performed no part of the service on the 29 carloads for which the demurrage was collected and in the collection thereof he was acting solely as agent for the corporate carrier. Practically the same situation is presented as in *Terre Haute, Indianapolis & E. T. Co. v. Director General, supra.*

We find that defendant is not liable for the collection of illegal demurrage charges on the 29 shipments as to which the periods of detention were entirely prior to Federal control, but that he is liable for the collection of illegal demurrage charges on the one remaining shipment. The order will be modified accordingly.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION held at its office in Washington, D. C., on the 7th day of October, 1924.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA & MISSISSIPPI RAILROAD COMPANY; THE BAL-

TIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE LONG ISLAND RAILROAD COMPANY; MOBILE & OHIO RAILROAD COMPANY; NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY; AND PHILADELPHIA & READING RAILWAY COMPANY.

No. 11881. (Sub-No. 1.)

SAME

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION; SHREVEPORT, HOUSTON & GULF RAILROAD COMPANY; AND SOUTH BROOKLYN RAILWAY COMPANY.

It appearing, That on March 2, 1922, the commission entered its report and on November 13th, 1922, its order awarding reparation in the above entitled proceedings;

It further appearing, That on April 9 and May 8, 1923, the commission entered its orders amending the said order of November 13th, 1922, and reopened the

proceedings for further hearing, which has been had, and the commission having, on the date hereof, made and filed a report on further hearing, which said report on further hearing is hereby referred to and made a part hereof;

It is ordered, That defendant James C. Davis, Director General of Railroads, as Agent, be, and he is hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 1, 1924, the sum of $185.00 with interest thereon at the rate of six per cent per annum from March 30th, 1918, on account of illegal demurrage and reconsignment charges collected on a carload of lumber reconsigned at Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

ORDER ALLOWING AMENDMENT

SATURDAY, MARCH 27TH, 1926

In open Court, Honorable W. I. Grubb, Presiding

2879 KRAUSS BROS. LUMBER COMPANY, A CORPORATION,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT, UNDER AND BY VIRTUE OF SECTION 206 OF TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION, AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION.

This cause coming on to be heard, this day, come the parties herein by counsel, and in person, and plaintiff by leave of the court first had and obtained amends complaint by adding Counts 4, 5, 6, 7 and 8, by separate paper this day filed.

Thereupon the defendant pleads in short by consent the general issue with leave to give in evidence any matter which, if well pleaded, would be admissible in defense of the action, to have effect as if so pleaded; with leave to the plaintiff to give in evidence any matter which, if well pleaded, would be admissible in reply to such defensive matter to have effect as if so pleaded.

Thereupon by agreement of counsel, it is ordered by the court that this cause be and is hereby continued.

AMENDMENT TO COMPLAINT SUBSTITUTING ANDREW W. MELLON FOR JAMES C. DAVIS, AS DIRECTOR GENERAL

Filed March 27, 1926
W. S. Lovell, Clerk

IN THE DISTRICT COURT OF UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT, under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

Comes the plaintiff in the above styled cause, and by leave of court first had and obtained, amends its complaint by substituting "Andrew W. Mellon, as Agent" as party defendant in the name, place and stead of "James C. Davis, as Agent," and wherever claim is made against the said James C. Davis, as Agent, the same shall be amended so as to read against the said Andrew W. Mellon, as Agent.

J. P. Mudd,
Attorney for Plaintiff.

ORDER ALLOWING

SATURDAY, MARCH 27TH, 1926

In Open Court, Honorable W. I. Grubb, Presiding

No. 2879.

KRAUSS BROS. LUMBER COMPANY, A CORPORATION,

vs.

JAMES G. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT, ETC.

This cause coming on to be heard, this day, come the parties herein by counsel and in person, and upon plaintiff's motion and by leave of the court first had and obtained plaintiff amends complaint by substituting "Andrew Mellon as Agent" as party defendant in the name, place and stead of James G. Davis as Agent, "And wherever claim is made against the said James G. Davis, as agent, the same is hereby amended so as to read against the said Andrew W. Mellon as Agent, as appears by separate paper this day filed."

DEMURRER OF DEFENDANTS, MOBILE & OHIO RAILROAD CO. AND ALABAMA GREAT SOUTHERN RAILROAD CO.

Filed May 1, 1926
W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES IN AND FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2879

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES C. DAVIS, Director General of Railroads, as Agent under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

Comes the defendants, Mobile & Ohio Railroad Company, a corporation, and Alabama Great Southern Railroad Company, a corporation, separately and severally, and each for itself alone demurs to the complaint as filed herein, and as grounds for such demurrer assigns the following, separately and severally, to-wit:

1. For that said complaint states no cause of action against this defendant.

2. For that the court judicially knows that this defendant and the Director General of Railroads were not operating as common carriers at one and the same time, and that therefore this defendant cannot be jointly liable to the plaintiff as alleged in said complaint.

3. For that construing the complaint, and the exhibit thereto, most strongly against the plaintiff, it affirmatively appears that the said award sued on was not against this defendant in any amount.

4. For that construing the complaint and the exhibit thereto, most strongly against the plaintiff, it affirmatively appears that the said award here sued on was against the Director General of Railroads for the operation of this defendant's line of railroad, and not against this defendant in any amount.

5. For that said complaint contains a misjoinder of parties defendant.

6. For that said complaint contains a misjoinder of parties defendant in that this defendant is sued jointly with the Director General of Railroads as agent under the Transportation Act of 1920, when the court judicially knows that this defendant cannot be jointly liable with said Agent.

7. For that construing said complaint most strongly against the plaintiff, it affirmatively appears that said charges were collected during the Federal Control of Railroads, and the court knows judicially that this defendant did not collect said charges during said time.

8. For that construing the complaint most strongly against the plaintiff, it affirmatively appears that said

charges accrued while the railroad of this defendant was being operated by the Railroad Administration, and that said overcharges were collected by said Railroad Administration.

STOKELY, SCRIVNER, DOMINICK & SMITH,
and ALEX M. BULL,
Attorneys for the above named Defendants.

COURT RECORD

SATURDAY, MAY 1ST, 1926

The District Court of the United States for the Southern Division of the Northern District of Alabama, met pursuant to adjournment; Present, Honorable W. I. Grubbs, United States District Judge, Northern District of Alabama, presiding; Honorable Charles B. Kennamer, United States Attorney; Thos. J. Kennamer, United States Marshal, and W. S. Lovell, Clerk.

2879 KRAUSS BROTHERS LUMBER COMPANY, A CORPORATION

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT, UNDER AND BY VIRTUE OF SECTION 206 OF THE TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION; ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION.

This cause coming on to be heard, this day, comes the parties herein by counsel, and in person, and defendants submit a demurrer to complaint as amended, and said demurrer being heard, considered and understood by the court, it is ordered, adjudged and decreed by the court that said demurrer be and is hereby overruled and denied.

Thereupon issue being joined on plaintiff's complaint as amended and defendants plea of general issue pleaded in short by consent, with leave to give in evidence any matter which, if well pleaded, would be admissible in defense of the action, to have effect as if so pleaded, and with leave to the plaintiff to give in evidence any matter which, if well pleaded, would be admissible in repyl to such defensive matter, to have effect as if so pleaded; to try this cause comes a jury of good and lawful men, to-wit: L. E. Garrett and eleven others duly empanelled, tried and sworn and the trial of this cause is begun.

After the introduction of the evidence, the argument of counsel, the oral charge delivered by the court, the jury returned in open court the following verdict which was read by the clerk of this court, to-wit: "We the jury find the issue in favor of the defendants. L. E. Garrett, Foreman."

Thereupon, it is ordered, adjudged and decreed by the court that said defendants go hence without day in respect to this cause, and that the plaintiff be taxed with all costs in this behalf expended for which costs an execution may issue.

BILL OF EXCEPTIONS

Filed August 19th, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, Director General of Railroads, as agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile & Ohio Railroad Company, a corporation, and Alabama Great Southern Railroad Company, a corporation, Defendants.

BE IT UNDERSTOOD that in the trial of this cause on the 1st day of May, 1926, the Honorable Wm. I. Grubb presiding and both parties appearing by counsel, a jury was duly empaneled and the following proceedings had:

Mr. Mudd, Attorney for Plaintiff: Your Honor, we wish to offer in evidence Exhibits 1, 2, 3, 4, 5 and 6,

respectively, and do now introduce them and each of them in evidence, said exhibits being as follows:

Exhibit No. 1 is an order of the Interstate Commerce Commission, dated March 2nd, 1922, in case No. 11881, Krauss Brothers Lumber Company vs. Director General, as agent, Alabama & Mississippi Railroad Company, et al. Exhibit No. 1 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 2 is a duly certified copy of an order of the General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 13th day of November, 1922, in case No. 11881, Krauss Brothers Lumber Company vs. Director General, as agent, Alabama & Mississippi Railroad Company, et al. Exhibit No. 2 is hereinafter set out in full, and made a part of this bill of exceptions.

Exhibit No. 3 is an order of the Interstate Commerce Commission, dated April 9th, 1923, in the case of Krauss Brothers Lumber Company vs. Director General, as agent, Alabama & Mississippi Railroad Company. Exhibit No. 3 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 4 is an order of the Interstate Commerce Commission, dated May 8th, 1923, in said above mentioned case. Exhibit No. 4 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 5 is a supplemental report by the Interstate Commerce Commission, together with an order of said commission, dated October 7th, 1924, and referring to the said hereinabove mentioned case. Exhibit No. 5 is hereinafter set out in full and made a part of this bill of exceptions.

Exhibit No. 6 is a true and correct copy of Interstate Commerce Commission Supplemental Rule Five, showing the certification of charges by the defendant carriers to the Interstate Commerce Commission, from which amount reparation awards were computed.

It is admitted by the parties to this cause, subject to exception on the part of the plaintiff on the ground that the evidence is illegal; irrelevant and incompetent, that of the amount awarded by the Interstate Commerce Commission against the Director General, as agent, and the Mobile & Ohio Railroad Company (the same being the second item of its award in case No. 11,881), the said Mobile & Ohio Railroad Company received and retained only $245.00, and all of said $245.00 being demurrage charges, and none thereof being for any reconsignment charge. The plaintiff especially objects to the admissibility of such evidence on the ground that the same is immaterial, illegal and incompetent. The court overrules said objection, and the plaintiff excepts.

It is also agreed by the parties that no portion of the awards made by the Interstate Commerce Commission in favor of the plaintiff and against the defendants, as shown by the order of November 13th, 1922, and identified as Exhibit No. 2, post, has been paid.

DEFENDANTS' TESTIMONY.

Mr. Bull for the defendants:

I want to offer as defendants' Exhibit No. 7 the the pleadings before the Interstate Commerce Commission, and as Exhibit No. 8 the testimony and all of the exhibits taken and filed before the Interstate Commerce Commisison at the hearing on January 10th, 1921, which is the hearing upon which the original order was based; and as Exhibit No. 9 I want to file a copy of the Director General's petition for a reargument or reconsideration, and the order denying that. As Exhibit 10 I am going to file the correspondence which led up to the second order of the Commission, eliminating the Alabama Great Southern Railroad. There are attached to these letters the orders themselves. As Exhibit No. 11 I wish to offer the testimony and exhibits offered at the hearing when the Interstate Commerce Commission re-opened the case to determine how much was due from the Alabama Great Southern Railroad Company. I will offer as Exhibit No. 12 an affidavit of Mr. Tracey as to the division and accounting between the Alabama Great Southern Railroad Company and the Director General.

The plaintiff objected to the introduction of all the foregoing exhibits, separately and severally, Exhibit No. 7 to Exhibit No. 12, inclusive, offered by the defendants, on the ground that each of the same were immaterial, irrelevant and incompetent, and on the further ground that they and neither of them have no bearing on the issues of this case, and are an improper attempt to impeach the findings and orders of the Interstate Commerce

Commission. The court overruled the objection, and the plaintiff reserved an exception.

It is admitted by the parties in open court that if any attorney's fee is payable under the law for the institution and prosecution of this suit in the Federal District Court that $1,000.00 will be a reasonable attorney's fee.

The plaintiff's exhibits referred to as Exhibit No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. 4, Exhibit No. 5, and the defendants' Exhibit No. 12 are hereinafter set forth fully as a part of this bill of exceptions. By virtue of an order of the Presiding Judge, W. I. Grubb, plaintiff's Exhibit No. 6 and the defendants' exhibits numbers 7, 8, 9, 10 and 11, respectively, are omitted from this bill of exceptions in order that they may be sent by the Clerk of the lower court, in compliance with the said order of the Presiding Judge, direct to the Court of Appeals.

This was all the evidence in the case.

EXHIBIT NO. 1.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted Nov. 22, 1921. Decided March 2nd, 1922.

Demurrage and reconsignment charges assessed on carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn., found illegal. Reparation awarded.

Harry S. Elkins and Ross H. Johnson for complainant; H. L. Walker, Alex M. Bull, and John F. Finerty for Director General of Railroads. H. L. Walker for Mobile & Ohio Railroad Company.

REPORT OF THE COMMISSION.

Division 2, Commissioners Daniels, Esch and Campbell. By Division 2:

Exceptions were filed by the complainant and by the Director General of Railroads, as Agent, to the report proposed by the examiner, and the issues were orally argued.

Complainant is a corporation engaged in the wholesale lumber business, with its principal office at New Orleans, La. It alleges that defendants unlawfully collected demurrage and reconsignment charges on carload shipments of lumber, shipped between November 1st, 1917, and January 12th, 1918, originally billed to Meridian, Miss., Jackson, and Chattanooga, Tenn., and reconsigned at those points to numerous destinations north and east thereof. Reparation only is sought.

The lumber was loaded at mills with which complainant had contracts, located at various points in Mississippi, Alabama, Louisiana and Texas. The shipments moved into Meridian and Jackson over the Mobile & Ohio, and into Chattanooga over the Alabama Great Southern. Most of them were placed in transit before being sold, so that complainant did not know the ultimate destination at the time they were started. Prior or subsequent to arrival at the reconsigning points the lumber was sold to purchasers at points in Pennsylvania, Kentucky, New Jersey, West Virginia, Ohio, Indiana, and New York, and orders were transmitted to defendants directing reconsignment to the latter points. These orders defendants either refused to accept or in any event to comply with immediately, because embargoes were in effect against the points of destination from the original points of shipment, and from the reconsigning points when the shipments originated. Demurrage was assessed for the resulting detention of the cars. In some instances reconsignment charges also were collected, which defendants admit was done without tariff authority. Some of the lumber was unloaded and stored at the reconsigning points, but most of the shipments were held in the cars

and moved to destinations as the embargoes were lifted from time to time. These embargoes were brought about by severe congestion of traffic throughout the east during the period in question and were constantly being modified, cancelled, and restored to meet particular emergencies.

Complainant does not question the reasonableness or necessity of the embargoes, but contends that as defendants' tariffs contained no provision against reconsignment to an embargoed point, detention of the cars was due to defendants' inability to fulfill the obligations imposed by the tariffs, and that the charges were therefore illegal. On January 13th, 1918, rules became effective prohibiting reconsignment when in conflict with embargoes.

Defendants insist that complainant knew before the shipments were tendered that embargoes were in effect throughout the territory in question, and as shipments could not have been made either from the original points or locally from the points of reconsignment, billing of the shipments to the latter points was for the purpose of evading and nullifying the embargoes. Complainant admits that it knew that embargoes were in effect generally throughout the territory in question, but states that since the final destinations were not known at the time shipments were started it could have had no knowledge that they were under embargo. It had been complainant's practice for years to reconsign at these same points, and it disclaims any intention on its part to evade the embargoes.

We have repeatedly held that when tariffs contain no restriction against reconsignment to embargoed points, demurrage charges may not be assessed for the car detention resulting therefrom. Reconsignment case, 47 I. C. C., 590, 634; *Wood v. N. Y. P. & N. R. R. Co.*, 53 I. C. C., 183; *Atlantic Lumber Co. v. N. Y. P. & N. R. R. Co.*, 57 I. C. C., 129.

Defendants admit that demurrage should not be assessed if the final destinations were not under embargo when the shipments left the point of origin, but contend that if the points of final destination were under embargo at the time the shipments started and at the time of reconsignment the carriers are no more required to reconsign to such points than to accept the shipments at the points of origin. They argue that since the right of reconsignment attaches as of the date of shipment, even if the order be given subsequently, and since there was no obligation to accept the shipments at points of origin on account of the embargoes, there was likewise no obligation to reconsign. The obligation to accept articles tendered for transportation is governed by general principles of law, while the obligation to reconsign is determined by rules lawfully on file with us. The right to refuse shipments temporarily for good cause by the establishment of embargoes, which are not required to be filed with us, is recognized. The right to reconsign depends entirely upon the construction of rules, which are required to be filed in the same manner as rates, and if the carriers do not restrict such rules to the extent of their capacity to perform the service, the shipper can not be held liable for the detention and can not abate the cause thereof, as in

the case of an embargo, which is a disability of the carrier.

We find that the demurrage and reconsignment charges assailed were illegal; that complainant made the shipments as described and paid and bore the charges thereon; that it has been damaged in the amount of the charges found herein to have been illegally collected; and that it is entitled to reparation, with interest. Complainant should comply with Rule V of the Rules of Practice.

66 I. C. C., 637.

EXHIBIT NO. 2.

ORDER.

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 13th day of November, A. D., 1922.

No. 11881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881. (Sub. No. 1.)

SAME.

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

It appearing, That on March 2nd, 1922, the commission entered its report in the above entitled proceedings, which is hereby referred to and made a part hereof, and these proceedings now coming on for further consideration on the question of reparation, and the parties having

filed agreed statements with respect to the shipments in question, we find that complainant is entitled to awards of reparation from the defendants named in the following table in the amounts set opposite their respective names, with interest.

Defendants	*Amounts*	*With Interest From*
James C. Davis, Director General of Railroads, as Agent	$2,894.00	June 1, 1918
Mobile & Ohio Railroad Company, and James C. Davis, Director General of Railroads, as Agent	4,530.00	July 1, 1918
Alabama Great Southern Railroad, and James C. Davis, Director General of Railroads, as Agent	2,932.00	March 20, 1918

It is therefore ordered, That the defendants named in the above table be, and they are hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 28th, 1922, the amounts set opposite their respective names in said table, with interest thereon at the rate of 6 per cent per annum from the dates therein set forth, as reparation on account of illegal demurrage and reconsignment charges assessed on numerous carload shipments of lumber reconsigned at Meridian, Miss., Jackson and Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,

(SEAL) Secretary.

EXHIBIT NO. 3.

ORDER.

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 9th day of April, A. D., 1923.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

vs.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881 (Sub. No. 1.)

SAME.

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in this proceeding on November 13th, 1922, authorizing the payment of reparation, be, and it is hereby, amended by eliminating therefrom the Alabama Great Southern Railroad Company as a defendant.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT NO. 4.

ORDER.

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 8th day of May, A. D., 1923.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

No. 11,881 (Sub. No. 1.)

SAME.

vs.

DIRECTOR GENERAL, AS AGENT, ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION, ET AL.

Upon further consideration of the record in the above entitled proceeding, and good cause appearing therefor:

It is ordered, That the order entered in this proceeding on November 13th, 1922, as amended by order

entered April 9th, 1923, be, and it is hereby, further amended by striking out the award of reparation against James C. Davis, Director General of Railroads, as agent, in the sum of $2,932.00.

It is further ordered, That this proceeding be, and it is hereby, reopened for such further hearing as the Commission may hereafter direct, solely for the purpose of determining against whom the award of reparation, above referred to, should run and in what amounts.

By the Commission.

GEORGE B. McGINTY,
Secretary.

(SEAL)

(Signed) GEORGE B. McGINTY,
Secretary.

EXHIBIT NO. 5.

INTERSTATE COMMERCE COMMISSION.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

DIRECTOR GENERAL, AS AGENT, ALABAMA & MISSISSIPPI RAILROAD COMPANY, ET AL.

Submitted October 30th, 1923. Decided Oct. 7th, 1924.

Upon further hearing amended order further modified as to amount of reparation awarded. Original report 66 I. C. C., 637.

Johnson & Elkins and *Harry S. Elkins* for complainant.
John F. Finerty and *Alex M. Bull* for Director General of Railroads, as agent.

REPORT OF THE COMMISSION ON FURTHER HEARING BY THE COMMISSION.

In our original report, 66 I. C. C. 637, we found that demurrage and reconsignment charges assessed on certain carload shipments of lumber reconsigned at Merid-

ian, Miss., and Jackson and Chattanooga, Tenn., were illegal. The original order of reparation contained an item of $2,932 which the Alabama Great Southern and the Director General of Railroads, as Agent, were directed to pay to complainant with interest from March 20th, 1918. This amount of reparation was found due upon 30 carload shipments reconsigned at Chattanooga and was covered by the complaint in No. 11,881 (Sub. No. 1). After the order had been issued attention was directed to the fact that although the Alabama Great Southern was mentioned in the body of the complaint it was not made a party defendant, and had not been served. Accordingly, the order was amended so as to eliminate this item therefrom and a further hearing was had solely for the purpose of determining against whom the award of reparation, above referred to, should run, and in what amounts.

The 30 carloads were shipped during the period from October 24th to December 27th, 1917. Demurrage in the amount of $2,747 on 29 cars was collected for detentions which occurred prior to Federal control, and $180.00 on one car for detention during Federal control. A reconsignment charge of $5.00 was also collected on this car. All of the shipments were delivered and all the charges were collected by the Director General of Railroads during Federal control. The demurrage and reconsignment charges of $185.00 collected on the one shipment accrued to the Director General of Railroads and he clearly became liable therefor. The demurrage charges on the other 29 shipments were credited to the Alabama Great Southern. The real question for determination concerns these shipments, and is: Should the Director

General of Railroads, as agent, hereinafter called defendant be required to refund charges illegally collected by the Director General of Railroads after January 1, 1918, for detention prior to Federal control of cars containing shipments subsequently transported in part and delivered by him.

The liability of defendant in actions arising out of Federal control are set forth in Section 206 of the Transportation Act, 1920, which provides in part:

> (c) Complaints praying for reparation on account of damage claimed to have been caused by reason of the collection or enforcement by or through the President, during the period of Federal control of * * * charges, * * * ,which were * * * * in violation of the Interstate Commerce Act, may be filed with the Commission, * * * against the agent designated by the President under subdivision (a), naming in the petition the railroad or system of transportation against whom such complaint would have been brought if such railroad or system had not been under Federal control at the time the matter complained of took place. X X X X X X X.

If there is any authority for the award of reparation against defendant it must be found in this provision. In reference thereto we said in *Terre Haute, Indianapolis & E. T. Co. v. Director General,* 77 I. C. C. 658.

> We believe that this provision was intended to cover charges collected for services performed, at least in part, by the Director General during Federal con-

> trol, and that complaints regarding charges collected by the director general, as agent for the carriers, on account of services performed wholly prior to Federal control, should be filed against the carriers themselves. * * * * Our consideration of the complaint will therefore be confined to shipments which were delivered and on which the charges were paid on or subsequent to January 1, 1918.

In that case transportation charges were in issue. In this case in so far as it concerns the shipments which were detained prior to Federal control, demurrage charges are to be considered. Complainant seeks to base defendant's liability on the mere collection of illegal charges during Federal control. It urges that no right of action accrued until the illegal charges were collected and that the damage was inflicted by the Director General of Railroads. It contends also that the demurrage charges were incidental to the through transportation and that as the Director General of Railroads has completed the transportation service the defendant is liable for illegal demurrage, collected on the shipments just as much as he would be for the collection of illegal transportation charges.

But demurrage charges are no part of the rate or through charge in effect at the time the shipment is forwarded from point of origin. *Getz Brothers & Company v. Director General,* 85 I. C. C. 673. Although they may follow the shipment and be collected together with the transportation charges, they are for a distinct and separate service. The Director General of Railroads performed no part of the service on the 29 carloads

for which the demurrage was collected and in the collection thereof he was acting solely as agent for the corporate carrier. Practically the same situation is presented as in *Terre Haute, Indianapolis & E. T. Co. v. Director General, supra.*

We find that defendant is not liable for the collection of illegal demurrage charges on the 29th shipments as to which the periods of detention were entirely prior to Federal control, but that he is liable for the collection of illegal demurrage charges on the one remaining shipment. The order will be modified accordingly.

ORDER.

At a General Session of the Interstate Commerce Commission held at its office in Washington, D. C., on the 7th day of October, 1924.

No. 11,881.

KRAUSS BROTHERS LUMBER COMPANY

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA & MISSISSIPPI RAILROAD COMPANY; THE BALTIMORE & OHIO RAILROAD COMPANY; THE CENTRAL RAILROAD COMPANY OF NEW

JERSEY; THE CHESAPEAKE & OHIO RAILWAY COMPANY; THE LONG ISLAND RAILROAD COMPANY; THE MOBILE & OHIO RAILROAD COMPANY; NEW ORLEANS & NORTHEASTERN RAILROAD COMPANY; THE PENNSYLVANIA RAILROAD COMPANY, THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILROAD COMPANY; AND PHILADELPHIA & READING RAILWAY COMPANY.

No. 11,881 (Sub. No. 1.)

SAME.

v.

JAMES C. DAVIS, DIRECTOR GENERAL OF RAILROADS, AS AGENT; ALABAMA, TENNESSEE & NORTHERN RAILROAD CORPORATION; SHREVEPORT, HOUSTON & GULF RAILROAD COMPANY; AND SOUTH BROOKLYN RAILWAY COMPANY.

It appearing, That on March 2nd, 1922, the commission entered its report and on November 13th, 1922, its order awarding reparation in the above entitled proceedings:

It further appearing, That on April 9th and May 8th, 1923, the commission entered its orders amending the said order of November 13th, 1922, and reopened the proceedings for further hearing, which has been had, and the commission having, on the date hereof, made and

filed a report on further hearing, which said report on further hearing is hereby referred to and made a part hereof;

It is ordered, That defendant James C. Davis, Director General of Railroads, as Agent, be, and he is hereby, authorized and directed to pay unto complainant, Krauss Brothers Lumber Company, on or before December 1, 1924, the sum of $185.00 with interest thereon at the rate of six per cent per annum from March 30th, 1918, on account of illegal demurrage and reconsignment charges collected on a carload of lumber reconsigned at Chattanooga, Tenn.

By the Commission.

GEORGE B. MCGINTY,
Secretary.

(SEAL)

EXHIBIT NO. 12.

No. 2879.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

JAMES G. DAVIS, DIRECTOR GENERAL, ETC., ET AL, Defendants.

It is stipulated and agreed that the atached affidavit, waiving all objection to its form, shall be treated as a deposition of the witness, L. J. Tracy, duly taken in this case upon proper notice; except, however, that each and every objection (other than insistence on the production of books or records) which might be made to such testimony, on any part thereof, if offered upon examination of said witness in open court in this case, may be made with like and equal force and effect to said testimony when offered by said affidavit.

J. P. MUDD, Attorney for Plaintiff.
ALEX M. BULL,
STOKELY, SCRIVNER, DOMINICK & SMITH,
Attorneys for Defendants.

CITY OF WASHINGTON,
DISTRICT OF COLUMBIA } ss.

Personally appeared before me, W. B. Robinson, a Notary Public in and for the District of Columbia, L. J. Tracy, who, first being duly sworn, deposes and says that he is the Comptroller for the Director General of Railroads, and as such, has charge of his accounts.

That he has had made under his direction and supervision an examination of the accounts of the Director General of Railroads, and the Alabama Great Southern Railroad Company to ascertain the division between the said Director General of Railroads, and the Alabama Great Southern Railroad Company of the sum of $2,932.00, which is the third item shown in the order of the Interstate Commerce Commission of November 13, 1922, in case No. 11881 Krauss Brothers Lumber Co. v. Director General, as Agent, et al, and in case No. 11881 (Sub. No. 1) same v. Director General of Railroads, as Agent, et al.

That such examination develops that of the said $2,932.00, $185.00, composed of $180.00 demurrage and $5.00 reconsigning charge, was credited to and retained by the said Director General of Railroads, and that the remainder of said $2,932.00, to-wit: $2,747.00, was credited to and retained by the Alabama Great Southern Railroad Company.

L. J. TRACY.

Subscribed and sworn to before me, this 14th day of January, 1926, in the City of Washington, District of Columbia.

(SEAL) W. B. ROBINSON,
Notary Public.

The plaintiff requested in writing the following written charge, which charge the court refused to give, and to which action of the court the plaintiff then and there before the jury retired duly excepted; said charge is as follows:

"If you believe the evidence in this case, you must find your verdict in favor of the plaintiff."

The defendants, separately and severally, requested in writing the following written charge which the court gave, and to which action of the court the plaintiff then and there before the jury retired duly excepted, separately and severally, to the giving of said charge.

"If the jury believe the evidence in this case, your verdict must be for the defendants."

The above bill of exceptions signed by the District Judge, this the 15th day of July, 1926.

W. I. GRUBB, District Judge.

Presented this the 15th day of July, 1926.

W. I. GRUBB, District Judge.

Approved this the 15th day of July, 1926.

W. I. GRUBB, District Judge.

Filed August 19, 1926.

W. S. LOVELL, Clerk.

ORDER TO TRANSMIT ORIGINAL EXHIBITS

Filed July 15, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, Director General of Railroads, as agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile & Ohio Railroad Company, a Corporation, and Alabama Great Southern Railroad Company, a Corporation, Defendants.

It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:

It is therefore ordered that the following papers, to-wit: Exhibits 6 to 11, inclusive, referred to and de-

scribed in the bill of exceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

GIVEN, this the 15th day of July, 1926.

W. I. GRUBB,
United States District Judge.

AGREEMENT FOR ORIGINAL EXHIBITS TO BE SENT TO U. S. CIRCUIT COURT OF APPEALS

Filed July 15, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

No. 2879.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, Director General of Railroads, as agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile & Ohio Railroad

Company, a Corporation, and Alabama Great Southern Railroad Company, a Corporation, Defendants.

The parties to this cause by their respective counsel do hereby stipulate and agree as follows:

That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10 and 11 may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that said exhibits, viz: 6, 7, 8, 9, 10 and 11 shall be omitted from the record, and sent direct by the Clerk of the trial court to the Court of Appeals.

J. P. MUDD, Attorney for Plaintiff.
A. M. BULL,
STOKELY, SCRIVNER, DOMINICK & SMITH,
Attorneys for Defendants.

PETITION FOR WRIT OF ERROR

Filed July 24, 1926

W. S. Lovell, Clerk

PETITION OF KRAUSS BROTHERS LUMBER COMPANY FOR WRIT OF ERROR.

IN THE DISTRICT COURT OF UNITED STATES
IN AND FOR THE SOUTHERN DIVISION
OF THE NORTHERN DISTRICT
OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

TO THE HONORABLE W. I. GRUBB, JUDGE OF SAID COURT:

Now, comes the Krauss Brothers Lumber Company, the Plaintiff, by J. P. Mudd, its attorney, and feeling

itself aggrieved by the final judgment of this court rendered against it and in favor of Andrew W. Mellon, as Agent, on the 1st day of May, 1926, hereby prays that a writ of error may be allowed to it from the United States Circuit Court of Appeals for the Fifth Circuit to the District Court of the United States for the Southern Division of the Northern District of Alabama, and, in connection with this petition, the petitioner herewith presents its assignment of error.

Petitioner further prays that an order of supersedeas be entered herein pending the final disposition of the cause, and that the amount of security may be fixed by the order allowing the writ of error.

J. P. MUDD,
Attorney for Plaintiff in Error.

ORDER ALLOWING WRIT OF ERROR

Filed July 24, 1926

W. S. Lovell, Clerk

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DIVISION OF THE NORTHERN DISTRICT OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE & OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation.

This 24th day of July, 1926, came the plaintiff in error by its Attorneys, and filed herein and presented to the Court its petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment here was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth

Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon the plaintiff in error giving bond according to law in the sum of Five Hundred Dollars, to be approved by this Court.

W. I. GRUBB,
United States District Judge.

ASSIGNMENT OF ERROR

Filed July 24, 1926

W. S. Lovell, Clerk

ASSIGNMENT OF ERROR

IN THE DISTRICT COURT OF UNITED STATES
IN AND FOR THE SOUTHERN DIVISION
OF THE NORTHERN DISTRICT
OF ALABAMA.

KRAUSS BROTHERS LUMBER COMPANY, a Corporation, Plaintiff,

vs.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT under and by virtue of Section 206, Transportation Act of 1920, MOBILE

& OHIO RAILROAD COMPANY, a Corporation, and ALABAMA GREAT SOUTHERN RAILROAD COMPANY, a Corporation, Defendants.

And now comes the plaintiff in error by J. P. Mudd, its attorney, and in connection with its petition for a writ of error says that in the record, proceedings, and in the final judgment aforesaid, manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

1. The court erred in giving the following written charge to the jury as requested by the defendant: "If the jury believe the evidence in this case your verdict must be for the defendants."

2. The court erred in not charging the jury as requested in writing by the plaintiff as follows: "If you believe the evidence in this case you must find your verdict in favor of the plaintiff."

3. The court erred in rendering judgment in favor of the defendants.

4. The court erred because the verdict is contrary to the evidence and the law.

5. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 7, the same being pleadings before the Interstate Commerce Commission.

6. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 8, the same being the testimony and all of the exhibits taken and filed before the Interstate Commerce Commisison at the hearing on January 10th, 1921.

7. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 10, the same being the correspondence which led up to the two orders of the Interstate Commerce Commission eliminating the Alabama Great Southern Railroad as a party defendant.

8. The court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 11, the same being the testimony and exhibits offered at the hearing before the Interstate Commerce Commission when said Commission re-opened the hearing to determine how much was due from the Director General to the plaintiff, and how much was due from the Alabama Great Southern Railroad to the plaintiff.

9. The Court erred in allowing the defendants to introduce in evidence over the plaintiff's timely objection Exhibit 12, the same being an affidavit of Mr. Tracey.

By reason thereof plaintiff in error prays that the judgment aforesaid may be reversed.

J. P. MUDD,
Attorney for Plaintiff in Error.

Presented this the 24th day of July, 1926.

WRIT OF ERROR

UNITED STATES OF AMERICA, ss.

The President of the United States:

To the Honorable Judges of the Circuit Court of the United States for the Fifth Judicial Circuit—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Krauss Brothers Lumber Company, a Corporation, and Andrew W. Mellon, Director General of Railroads, as Agent, under and by virtue of Section 206, Transportation Act of 1920, Mobile and Ohio Railroad Company, a Corporation, and Alabama Great Southern Railroad Company, a Corporation, a manifest error hath happened, to the great damage of the said Krauss Brothers Lumber Company, a Corporation, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do commnad you, If judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, together with this writ, so that you have the same at New Orleans, Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings afore-

said being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the 24th day of July, in the year of our Lord one thousand nine hundred and Twenty-Six.

W. S. LOVELL,
Clerk of the U. S. District Court Northern District of Alabama.

Allowed by
W. I. GRUBB,
Judge of the United States District Court, Northern District of Alabama.

BOND.

Filed July 24, 1926

W. S. Lovell, Clerk

Know All Men by these Presents: That we, Krauss Brothers Lumber Company, Inc., as principal, and American Surety Company of New York, a Corporation, as surety, are held and firmly bound unto Andrew W. Mellon, as Agent, Mobile and Ohio Railroad Company, Inc. and Alabama Great Southern Railroad Company, Inc. in the full and just sum of Five Hundred ($500.00)

Dollars, to be paid to the said Andrew W. Mellon, as Agent, Mobile and Ohio Railroad Company, Inc. and Alabama Great Southern Railroad Company, Inc. its certain attorneys, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 23rd day of July, in the year of our Lord one thousand nine hundred and twenty-six.

Whereas, lately at the present term of the District Court of the United States, for the ..... Division of the Northern District of Alabama, in a suit pending in said Court between Krauss Brothers Lumber Company, Inc., plaintiff, and Andrew W. Mellon, as Agent, a judgment was rendered against the said Krauss Brothers Lumber Company, and the said Krauss Brothers Lumber Company having obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Andrew W. Mellon, as Agent, citing and admonishing him to be and appear at THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, to be holden at New Orleans, La., within ..... days from the date hereof.

Now, the Condition of the Above Obligation is Such, That if the said Krauss Brothers Lumber Company shall prosecute said writ of error to effect, and answer all damages and costs if it fail to make the said

plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of

KRAUSS BROTHERS LUMBER CO., INC.
By J. P. MUDD, Attorney.

AMERICAN SURETY COMPANY OF NEW YORK,
By CHAS. VOUTI CORNELL,
Attorney-in-Fact.

Countersigned: D. M. ZIMMERMAN.

Approved by:
W. I. GRUBB,
Judge of the United States District Court, Northern District of Alabama. 7/24/26

CITATION

Filed July 24, 1926

W. S .Lovell, Clerk

UNITED STATES OF AMERICA

The President of the United States:

To Andrew W. Mellon, as Agent under Section 206, Transportation Act; Mobile & Ohio Railroad Company, Inc., and Alabama Great Southern Railroad Company—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fifth Judicial Circuit to be holden at New Orleans, La.

Pursuant to a Writ of Error filed in the Clerk's Office of the District Court of the United States for the Southern Division of the Northern District of Alabama, wherein Krauss Brothers Lumber Company, a Corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, The Honorable WILLIAM H. TAFT, Chief Justice of the Supreme Court of the United States, this 24th day of July, in the year of our Lord one thousand nine hundred and Twenty-Six.

W. I. GRUBB,
U. S. Dist. Judge.

Service of the within is hereby accepted by each of the defendants in error separately and severally.

This July 26, 1926.

S. P. SMITH,
Attorney of Record for Each of the Defendants in Error.

STOKELY, SCRIVNER, DOMINICK & SMITH,
Attorneys of Record for Defendants in Error.

CLERK'S CERTIFICATE

THE UNITED STATES OF AMERICA
NORTHERN DISTRICT OF ALABAMA

I, W. S. Lovell, Clerk of the District Court of the United States for the Southern Division of the Northern District of Alabama, do hereby certify that the foregoing pages numbered from one (1) to ninety-four (94), both inclusive, is a full, true and correct transcript of the record in the matter of Krauss Brothers Lumber Company, a Corporation, Plaintiff in Error, versus Andrew W. Mellon, Director General of Railroads, as agent, under Section 206, Transportation Act of 1920, Mobile & Ohio Railroad Company, and Alabama Great Southern Railroad Company, Defendants in Error, as fully as the same appears of Record and on file in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of said Court, at Birmingham, in said District, on this the 15 day of September, A. D. 1926.

W. S. LOVELL,
Clerk U. S. District Court, Northern District of Alabama.

Minute entry of argument and submission January 26, 1927, omitted in printing.

In United States Circuit Court of Appeals, Fifth Circuit

No. 4910

Krauss Brothers Lumber Company, a Corporation, Plaintiff in Error,

vs.

Andrew W. Mellon, Director General of Railroads, as Agent, et al., Defendants in Error

Error to the District Court of the United States for the Northern District of Alabama

Brenton K. Fisk, (Harry S. Elkins, J. P. Mudd, on the brief), for Plaintiff in Error.

Sidney P. Smith (Stokely, Scrivner, Dominick & Smith; Sidney F. Andrews; Alex M. Bull, on the brief), for Defendants in Error.

Before Walker, Bryan and Foster, Circuit Judges

Opinion—Filed April 7, 1927

Foster, Circuit Judge:

Plaintiff in error, plaintiff below, filed suit to recover $10,356, based on a reparation order of the Interstate Commerce Commission. The order annexed to the pleadings shows that plaintiff shipped certain carloads of lumber from various points in Mississippi, Alabama, Louisiana and Texas where it had mills, consigned to designated stations on the lines of defendants' railroads, some shipments being made before and some during Federal control. The lumber had not been sold when shipped, but before or after arrival at the initial destinations plaintiff sent reconsignment orders to defendants. In each instance there was an embargo in force against the point to which reconsignment was asked and compliance with the orders was refused. In consequence of delay demurrage and other

charges accrued and were collected. The Interstate Commerce Commission held that demurrage and other charges accruing at reconsignment points were not collectible unless set out in the tariffs filed, and made the reparation order accordingly.

At the close of all the evidence each side moved the Court for a directed verdict and did nothing more. The Court denied the motion of plaintiff and granted that of defendants without stating his reasons. Error is assigned to the action of the Court just noted. No other errors are assigned or suggested.

While an order of the Interstate Commerce Commission is necessary in most instances before a recovery of overcharges may be had it is not conclusive. The order of the Commission is prima facie evidence of the facts therein stated but it establishes only a rebuttable presumption, and all the issues are open before the court and the jury as in other cases. And in the Appellate Court the evidence adduced before the Commission, if offered on the trial in the District Court, and any additional evidence properly received, may be considered in support of or to correct the findings stated in the order. Meeker vs. Lehigh Valley Railroad, 236 U. S. 412-430; Pennsylvania R. R. Co vs. W. F. Jacoby & Co., 242 U. S. 89; Pennsylvania R. R. Co. vs. Weber, 257 U. S. 85.

It is well settled that where both parties ask the court for an instructed verdict without more and error is assigned only to the rulings of the court on the motions the appellate court must affirm if there is any evidence to support the verdict. Beuttell vs. Magone, 157 U. S. 154.

Turning to the record in this case, the bill of exceptions shows that the plaintiff offered in evidence what were denominated as exhibits 1, 2, 3, 4, 5, & 6, while defendants offered exhibits 7, 8, 9, 10, 11 & 12. The exhibits offered by plaintiff, speaking generally, were certified copies of orders made by the Interstate Commerce Commission and a copy of a certain rule of that Commission. The exhibits offered by the defendant consisted of the pleadings, some 200 pages of testimony and copies of tariffs and other documents, all of which were before the Commission at the hearing from which the reparation order resulted, and certain correspondence and an affidavit from a witness, Tracey, intro-

duced in the District Court. The bill of exceptions concludes with this statement:

"The plaintiff's exhibits referred to as Exhibits No. 1, Exhibit No. 2, Exhibit No. 3, Exhibit No. , Exhibit No. 5, and the defendants' Exhibit No. 12 are her inafter set forth fully as a part of this bill of exceptions. By virtue of an order of the Presiding Judge, W. I. Grubb, plaintiff's Exhibit No. 6 and the defendants' exhibits numbers 7, 8, 9, 10 and 11, respectively, are omitted from this bill of exceptions in order that they may be sent by the Clerk of the lower court, in compliance with the said order of the Presiding Judge, direct to the Court of Appeals."

Following this in the transcript appears an order of court and a stipulation signed by attorneys for both plaintiffs and defendants, as quoted below:

"It appearing to the court that in this cause it is necessary and proper in the opinion of the court that certain original papers and documents should be inspected in the Circuit Court of Appeals upon writ of error by said court:

"It is therefore ordered that the following papers, to-wit: Exhibits 6 to 11, inclusive, referred to and described in the bills of exceptions, be transmitted by the Clerk of this court to the Clerk of the Circuit Court of Appeals at New Orleans, La., and returned after the disposition of the writ of error to the Clerk of this Court.

"The parties to this cause by their respective counsel do hereby stipulate and agree as follows:

"That the plaintiff's exhibit No. 6 and that the defendants' exhibits 7, 8, 9, 10 and 11 may be omitted from the bill of exceptions, and sent by the Clerk of the trial court direct to the Court of Appeals in their original form, and further that the exhibits need not be printed in the record. This agreement is made in conformity with an order of the trial court by the presiding judge that said exhibits, viz: 6, 7, 8, 9, 10 and 11 shall be omitted from the record, and sent direct by the Clerk of the trial court to the Court of Appeals."

Conformable to the just quoted paragraphs, plaintiff's exhibit 6, about which we are somewhat in the dark, and defendants' exhibits 7, 8, 9, 10 and 11, consisting of all the evidence before the Commission including, we presume, copies of the tariffs on file, and other evidence which was before

the District Court, are not included in the bill of exceptions and are not printed in the transcript, but the original documents are sent up in compliance with the order and agreement but without anything to show they are made a part of the bill.

Our rule 14, paragraph 4 provides:

"Whenever it shall be necessary or proper in the opinion of the presiding judge in any Circuit or District Court, that original papers of any kind should be inspected in this Court upon writ of error or appeal, such presiding judge may make such rule or order for the safekeeping, transporting and return of such original papers as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings."

In passing we take occasion to say that the order transmitting part of the evidence in this case in the original should not have been granted. Agreement of counsel is no excuse for entering the order. The rule is intended to permit the transfer to this court of disputed documents; maps and blue prints not readily copied; and models and exhibits impossible to incorporate in the printed record. It was never intended to permit the sending up of a mass of original documents that could have been copied in the printed record, for the purpose of saving expense, especially where, as in this case, it is patent that the material facts could have been culled out and incorporated in the record by a mere statement.

From the above it is plain that all of the evidence upon which the case was tried is not in the bill of exceptions. The order of Court sending up the documents in the original does not purport to make them a part of the bill of exceptions, the rule of this court could not incorporate them therein, and the agreement of counsel expressly excludes them.

As applicable to the deficiency of the record here shown the well settled rule is this. Depositions, exhibits or certificates not contained in the bill of exceptions can not be considered even though found in the printed transcript. The parties by their affidavits or agreements can not cause that to become a bill of exceptions which is not such in a

legal sense. Where instructions of the court are assigned as error on a motion to direct a verdict or otherwise, unless the entire evidence pertinent to the question is in the bill the Appellate Court must presume that the omitted evidence justified the instruction.

Russell vs. Ely, 2 Black 575; Reed vs. Gardner, 17 Wall. 409; U. S. vs. Copper Queen Mining Co., 185 U. S. 495; Nashua Sav. Bank vs. Anglo-Am. Mortg. Co., 189 U. S. 221; Metropolitan R. R. Co. vs. Dist. of Columbia, 195 U. S. 322; U. S. ex rel Kinney vs. U. S. Fidelity Guarantee Co., 222 U. S. 283.

In view of the state of the record we are unable to review the judgment of the District Court.

Affirmed.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

JUDGMENT—April 7, 1927

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the plaintiff in error, Krauss Brothers Lumber Company, and the surety on the writ of error bond herein, American Surety Company of New York, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

PETITION FOR REHEARING—Filed May 10, 1927

Comes now the plaintiff-in-error, by Brenton K. Fisk as its attorney, and hereby petitions the Court to grant a rehearing of the above entitled case. As the ground for this petition the plaintiff-in-error avers that the Court has

violated Rule 7, "Revised Rules of the Supreme Court of the United States," which, by Rule VIII of this Court, has been expressly adopted.

The violation of said rule is apparent from the record and more particularly from the following points apparent therein:

(a) The Interstate Commerce Commission's findings of fact were not placed in issue in the District Court. Otherwise a directed verdict could not have been given; for these findings, unlike fictitious presumptions which are used only where there is no evidence, remain by virtue of the Interstate Commerce Act the ascertained and declared facts unless and until disproved.

(b) The bill of exceptions shows that no damaging admissions were made and that no new evidence was introduced except such as was fully embraced therein.

(c) The bill of exceptions, prepared under the supervision of the District Judge and bearing his official indorsement and approval, duly certifies that it contains all the evidence in the case.

(d) The word "omit," used in the bill of exceptions, was used advisedly, being the precise word used in the title to Rule 7, "Revised Rules of the Supreme Court of the United States", in relation to cumbersome and irrelevant matter not to be embraced in bills of exceptions.

(e) The findings of fact, which are ascertained facts and not groundless presumptions, together with the clear record that none of these findings was disputed and the discretionary certification of the District Court, under Rule 7, that all (material or relevant) evidence was set forth in the bill of exceptions, are further strengthened by the record's disclosure of the nature of the case and of the admissions made therein.

(f) The Commission's findings show that the entire controversy was confined to a single issue involving an important question in respect to the Commission's powers, namely:

1. When a car movement is delayed at a reconsigning point as the result of an embargo, may the shipper be charged for the delay without an express tariff provision authorizing such a charge?

2. The carriers' contention was that a reconsignment is equivalent to an entirely new shipment; that an embargo is a lawful excuse for declining to accept a car for initial shipment and therefore, despite any contrary rulings of the Commission, is a lawful excuse for failure to reconsign; that a refusal to reconsign makes the intermediate destination become the ultimate destination, whereupon demurrage commences to accrue as if the shipper had not duly demanded his non-discriminatory tariff right to reconsign.

3. The Commission found, as a fact, that an administrative rule which had been long enforced and generally recognized forbade the carriers to profit from their embargoes except where precise tariff provisions stipulated that charges for delay might be assessed for delays resulting from embargoes.

4. The Commission found, as the controlling point of law, that this administrative regulation had wholly superseded the common law on which the carriers relied. (This was obviously the point in the case.)

5. The Commission requested the parties to file formal stipulations showing the charges which had been imposed upon the shipper in violation of the principle aforestated. Such stipulations were filed and therefrom the reparation order was prepared.

The plaintiff-in-error respectfully urges, and earnestly believes, that in view of the state of the record, Rule 7, "Revised Rules of the Supreme Court of the United States", both authorized and directed the District Court to omit from the bill of exceptions all that unusually great mass of irrelevant exhibits which in no substantial sense whatsoever can be deemed any part of the evidence in the case and which consisted of several records and transcripts of proceedings before the Interstate Commerce Commission with exhibits thereto, including a massive file of embargo circulars, also complete files of correspondence and other similar writings, all of which would have made a cumbersome record of great volume and would have cost an enormous sum in the preparation and printing thereof.

Respectfully submitted,

(Signed) Brenton K. Fisk, Attorney for Plaintiff-in-Error.

May 7, 1927.

I hereby certify that I have duly served (3) copies of the foregoing petition upon each of the defendants in error therein named by mailing same, registered mail, duly addressed to Alex M. Bull, attorney of record for Director General, United States Railroad Administration, Washington, D. C. and to Sidney Smith, attorney of record for Mobile & Ohio Railroad Company and Alabama Great Southern Railroad Company, First National Bank Building, Birmingham, Alabama.

(Signed) Brenton K. Fisk.

IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER DENYING REHEARING—May 23, 1927

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 24, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ. And it is further ordered that the argument be limited to the question of practice in respect to the bill of exceptions upon which the case in the Circuit Court of Appeals was made to turn.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 342

KRAUSS BROTHERS LUMBER COMPANY,
PETITIONER,

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER AND BY VIRTUE OF SECTION 206, TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION, AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Krauss Brothers Lumber Company, respectfully shows:

1. PARTIES.—The petitioner, Krauss Brothers Lumber Company, hereafter called "shipper," is a corporation engaged in the wholesale lumber business, to whom the Interstate Commerce Commission, on shipper's formal complaint, ordered the respondents herein to pay reparation in the amount of $10,356 because of unlawful demurrage charges illegally collected. The respondents having failed to comply with the reparation order, the present suit thereon was filed against them in the United States District Court for the Northern District of Alabama by petitioner as plaintiff, pursuant to Section 16 of the Interstate Commerce Act.

2. NATURE OF PROCEEDING.—No issue on the reasonableness of any charge or practice was raised in any of the Interstate Commerce Commission's proceedings in this case. Neither was it denied that the respondents, in making the demurrage charges of which shipper complained, had disregarded a well-known and generally recognized administrative practice upon which the Commission had uniformly insisted. The sole issue was whether any such power had been vested in the Commission as would give it jurisdiction to decide that the charges should be refunded. Upon the Commission's decision (purely as a matter of law) that the Commission had such power, the parties, following its suggestion, filed formal stipulations under Rule V of the Commission's practice admitting the amounts of the charges, the illegality of which had been declared by the Commission, and thereupon the reparation order was made.

The conflicting views of the applicable law of the case arose out of facts which were mutually assumed by the parties and subsequently admitted, as aforestated. The shipper for years had made a practice of shipping lumber in carload quantity from points in the South to Cincinnati and other gateway points, and thereafter reconsigning the shipments to customers who had purchased them while in transit. Prior to January 13, 1918, there were no applicable tariff provisions in effect which stated that demurrage charges might be assessed for embargo delays at reconsigning points. The Interstate Commerce Commission for years had uniformly insisted upon the administrative practice of charging no demurrage for delays in carrying out reconsignment instructions, where the delays resulted from embargoes, pointedly observing that the carriers should not be permitted to profit from embargoes which they, themselves, declared. The charges involved in the present case had all been imposed prior to January 13, 1918, on which date there became effective certain tariff provisions specifically authorizing such charges.

The views of the defendants were that the Commission had no power to order a return of these demurrage charges, because (1) offering a shipment for reconsignment relates back to the initial tender of it for transportation, and (2) since the common law, quite outside the control of the Commission, empowers a carrier to reject a tender of goods for initial transportation while there are existing embargoes, likewise the same rule of common law, despite any insistence of the

Commission, authorizes rejection of a demand for reconsignment to points embargoed at the time of initial acceptance for shipment, whereupon demurrage accrues until the consignee accepts actual delivery of the goods. (The Commission's finding of facts and order appear in the record at pages 60 to 66, inclusive.)

3. History of the Case.—Upon formal proceedings, the Interstate Commerce Commission, on March 2, 1922, rendered its opinion, holding that shipper was entitled to a reparation order, and suggesting that the parties file formal stipulations under Rule V of its practice admitting and settling the items. On November 13, 1922, it issued a reparation order in the case, reciting that such stipulations had been filed and that the order was based thereon. The Director General alone was ordered to repay $2,894. He and respondent Mobile & Ohio Railroad Company were ordered to repay an additional $4,530, while he and respondent Alabama Great Southern Railroad were ordered to repay a still further sum of $2,932, all with interest.

Payment not having been made on or before December 28, 1922, as directed by the Commission, the present suit thereon was filed by petitioner as plaintiff against respondents as defendants on March 20, 1923, in the United States District Court for the Northern District of Alabama. The complaint conformed to the provisions of Section 16, Interstate Commerce Act, and contained the findings and order of the Commission as a part thereof.

After the subject-matter of the controversy had thus been placed in the court, the respondents, or one or more of them, sought a reopening of the case by the Commission. After a correspondence by letter between the Commission and such respondents, an order was made by the Commission reciting that respondent Alabama Great Southern Railroad had been eliminated from the Commission's proceedings because it had never been made a party thereto. Later, on May 8, 1923, the Commission made an order purporting to reopen the case. (Petitioner considers all the proceedings of the Commission in this case subsequent to the filing of the present action in the district court void for want of jurisdiction by the Commission over the subject-matter.)

Upon the reopening of the case, the Director General showed that he had remitted to the Alabama Great Southern Railroad in settlements with it all but $185 of the $2,932 item of charges, which item represented demurrage charges that accrued prior to the period of Federal control. On the theory that shipper's sole remedial right was to bring an action for *money received to shipper's use*, the Commission, on October 7, 1924, issued a finding of facts and order purporting to modify its original findings and order and to excuse the Director General from liability on all but such $185 of such $2,932 item.

On May 1, 1926, the present case in the district court, which had been filed March 20, 1923, as aforestated, came on for trial. Demurrers to the complaint, as originally filed, were overruled. Additional counts

were inserted by amendment and a demurrer to them also was overruled.

Thereupon the shipper, as plaintiff, duly introduced into the evidence the Commission's original findings (R., 60), the original order (R., 65), the order purporting to eliminate Alabama Great Southern Railroad Company (R., 67), the order purporting to reopen the case (R., 68), and the report and order purporting to modify and supplement the original findings and order (R., 70-76). Also the stipulations filed before the Commission under Rule V of its practice were put in evidence by shipper. It was stipulated in open court that shipper had not been paid any of the reparation which had been ordered (R., 57), also that only $245 of the $4,530 item which the Mobile & Ohio Railroad Company and the Director General had both been ordered to repay had ever been remitted by the Director General to the railroad corporation in settlements.

Thereupon shipper closed his case.

The respondents, over shipper's due objection that the same were incompetent, immaterial and irrelevant to any issue in the case, was permitted to place in evidence the following (R., 58):

1. The original pleadings before the Commission (R., 58).

2. The testimony and all exhibits taken and filed in the Commission's proceedings.

3. Petition for reopening the case.

4. Correspondence with Commission leading up to the reopening.

5. Testimony and exhibits in the proceedings after the reopening.

6. An affidavit (treated by stipulation as a deposition) showing that all but $185 of said $2,932 item had been remitted by the Director General of the Alabama Great Southern Railroad Company, as aforesaid.

Thereupon the respondents closed their case and shipper duly moved for a directed verdict, which motion was overruled and an exception noted. The respondents thereupon moved for a directed verdict, which motion was granted and shipper duly excepted (R., 79).

On July 24, 1926, a writ of error to the Circuit Court of Appeals for the Fifth Circuit was duly issued on the specified grounds that the district court had erred in overruling petitioner's motion for a directed verdict and also in directing a verdict in favor of respondents.

The bill of exceptions, which sets forth all of the foregoing, duly recites, "*This was all the evidence in the case.*" (R., 59).

The exhibits filed by respondents were exceedingly voluminous, there being, among other things, a complete file of embargo circulars included as a part of the evidence which had been placed before the Commission in the first proceeding. Since the findings of the Commission had not been attacked in the district court on any ascertainment of fact therein set forth and since the great mass of documentary exhibits which had been introduced by respondents not only related, for the most part, to proceedings by the Commission after it

had lost control of the subject-matter, there seemed to be a proper case for the application of Rule 7 of the Supreme Court (adopted by the circuit court by its Rule VIII) requiring the omission from the bill of exceptions of long and irrelevant documents. Accordingly, all of the Commission proceedings, except the several findings of fact and orders, were omitted from the bill of exceptions. The district judge duly approved the bill of exceptions, which contained the usual statement that it set out all the evidence in the case. Nevertheless, the parties stipulated, and the district court pursuant thereto ordered, that the omitted papers be transmitted to the circuit court of appeals under rules which will be set out in the accompanying brief.

The circuit court of appeals declined to pass upon the merits of the case, stating in its opinion (R., 96) that its action was based solely upon the omission, from the bill of exceptions, of documentary exhibits. The stated necessity for these documents is based upon an assumption that the Commission's ascertainment and finding of the facts have no greater weight than mere ordinary legal presumptions, such as those used to fill omissions in evidence. Based upon this assumption, which petitioner believes to be false, the court further presumes that the omitted exhibits contained evidence warranting the action of the trial judge in declining to leave the determination of any of the issues to a jury. In view of the clear-cut admissions and the legal issue presented by the Commission's report, it is not easy to imagine what such evidence might have been.

4. The Fundamental Errors.—The circuit court of appeals erred in conceding to the Interstate Commerce Commission's ascertainment and declaration of facts less evidential value than is given to an ordinary presumption.

The court also violated Rule 7, "Revised Rules of the Supreme Court of the United States," which had been adopted by the circuit court of appeals in its Rule VIII. In the light of the modern tendency toward avoiding prolixity in appeal records, the Supreme Court, in Rule 7, requires that wholly irrelevant matter be *omitted* from appeal records. The opinion of the court shows no necessity for any of the omitted documents to be before it, except necessity arising out of its discrediting the findings of the Commission.

The record shows clearly that the district court, without additional facts, decided the case upon the jurisdictional ground. None of the evidence submitted by respondents was submitted in such form that it could have been intended for a jury. The case stands, therefore, as a decision against the statutory powers of the Commission in all such cases.

As this case now stands, it appears that there was no way in which the simple issue of law, decided by the Commission, could possibly have been brought by petitioner up to the circuit court of appeals without a most unreasonably prolix and expensive record.

5. Important Reasons for Allowance of Writ.—The opinion of the circuit court of appeals gravely discredits the Interstate Commerce Commission by wholly rejecting its statement of the facts when admittedly

the only ground for the rejection is a presumption that is necessarily most flimsy in view of the disclosures of the record.

The fact that the clear-cut question of law which was placed before the Commission as the one and only issue in this case could not be carried to the circuit court of appeals without printing in the record a complete file of correspondence, a file of embargo circulars, records of Commission proceedings subsequent to the transfer of the case out of the Commission's jurisdiction, even when counsel and the trial judge earnestly endeavored to comply with Rule 7 of this Court, presents a most grave situation.

The district court's action in deciding, as a matter of law, that the uncontroverted findings of the Commission in this case would not support a verdict rests the case squarely upon the proposition that the railroads had a right to disregard an administrative practice which the Commission for years had been requiring them to observe and had a right to impose demurrage charges where the tariffs did not so provide and where the Commission uniformly forbade their imposition.

WHEREFORE, because of the gravity and importance of the aforementioned and other questions involved, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court directed to the judges of the United States Circuit Court of Appeals for the Fifth Circuit commanding them and each of them to certify and to send to this Court on a day certain to be therein designated,

a full and complete transcript of the record of the proceedings of that court in this case, which was there entitled, "Krauss Brothers' Lumber Company, a corporation, plaintiff in error, *v.* Andrew W. Mellon, Director General of Railroads, as Agent, under Section 206, Transportation Act of 1920; Mobile & Ohio Railroad Company, and Alabama Great Southern Railroad Company, defendants in error, No. 4910," to the end that the judgment of said court in such case may be reviewed as provided in Section 240 of the Judicial Code; that this Court will revise said judgment, and that your petitioner may have such other and further relief or remedy in the premises as to this Court may seem appropriate.

KRAUSS BROTHERS LUMBER COMPANY,
Petitioner.
By BRENTON K. FISK,
As Its Attorney.

STATE OF NEW YORK,
County of New York, ss:

Brenton K. Fisk, being duly sworn according to law on his oath says: I am attorney for Krauss Brothers' Lumber Company, the petitioner named in the foregoing petition. The petition is true of my own knowledge.

BRENTON K. FISK.

Subscribed in my presence and sworn to before me at New York, N. Y., on this the 28th day of June, 1927.

[NOTARIAL SEAL] MARGARET A. CROWE,
Notary Public, Queens County No. 315.

Notary Public, New York County Clerk's No. 557.
New York County Register's No. 9398.
Commission expires March 30, 1929.

Certificate of Counsel.

I hereby certify that I have examined the foregoing petition, and in my opinion it is well founded, and the case is one in which the prayer of the petition should be granted by this Court.

BRENTON K. FISK,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 342

KRAUSS BROTHERS LUMBER COMPANY,
PETITIONER,

v.

ANDREW W. MELLON, DIRECTOR GENERAL OF RAILROADS, AS AGENT UNDER AND BY VIRTUE OF SECTION 206, TRANSPORTATION ACT OF 1920; MOBILE & OHIO RAILROAD COMPANY, A CORPORATION, AND ALABAMA GREAT SOUTHERN RAILROAD COMPANY, A CORPORATION, RESPONDENTS.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Statement of Case.

The statement of the case has been made by the Interstate Commerce Commission (R., 60-66).

The first question requires an interpretation of the seventh "Revised Rules of the Supreme Court of the

United States," which the Circuit Court of Appeals for the Fifth Circuit had expressly adopted, reading in part as follows:

> 7. BILLS OF EXCEPTIONS—OMISSION OF UNNECESSARY EVIDENCE.—The judges of the district courts in allowing bills of exception shall give effect to the following rules:
>
> * * * * * * *
>
> 2. Only so much of the evidence shall be embraced in a bill of exceptions as may be necessary to present clearly the questions of law involved in the rulings to which exceptions are reserved * * *.

Plain recitals by the Interstate Commerce Commission of admissions made before it in formal proceedings cannot be disregarded unless the Commission is to be most completely discredited. The Commission says (R., 63):

> "Defendants admit that demurrage should not be assessed if the destinations were not under embargo when the shipments left the point of origin * * *."

Such a statement, if not to be discredited, means clearly that there was admitted (*a*) the existence of applicable reconsigning tariffs, (*b*) under which no inconvenience or inexpediency *at the time or place of reconsignment* would avail the carriers as justification for charging demurrage. The statement by the Commission, setting forth the issues, further shows that the carriers rested the entire case upon the Commis-

sion's alleged want of statutory power to order a refund of the charges. The stipulations, filed under Rule V of the Commission's practice (R., 65-66), necessarily admitted and settled the items and amounts recoverable. (See footnote.)

There is an obvious difference between the following two classes of cases in which a Commission goes beyond its granted powers:

> First. Where the Commission, in stating what purports to be facts ascertained by it, has apparently remained within the scope of its authority, but, examination of the whole record shows that one or more statements set forth as ascertained facts were not based upon evidence and were accordingly mere arbitrary statements of a wholly unauthorized nature.
>
> Second. Where the Commission makes no ascertainment of any controverted fact but limits its inquiry to questions of law and the subject-

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Footnote.—In view of the Commission's statement of the carriers' admissions, it is difficult for petitioner to attach importance to the following statements in the brief which respondents filed in the circuit court of appeals:

> "An examination of the rules in the tariffs (Exhibits 1 and 2 to the testimony before the Commission, which is Exhibit 8 in this record, p. 58) makes it clear that they are not of such character as to take away from these defendants the rights which the law gives them, in fact they are largely administrative or regulatory. For example, Rule 3 in Mobile and Ohio tariff (Exhibit No. 1) states that company will "undertake" to comply with "proper" requests, etc., and the Alabama Great Southern Ry. tariff, Rule 1 (Exhibit No. 2), carries similar provisions with the further limitation "when practical to do so," but without assuming any responsibility in connection therewith, and "solely as an accommodation to the owner."

matter of its inquiry lies beyond the scope of its granted powers.

If there were any ground for contending that the present case might be one of the "first" class last mentioned, there could be no doubt of the necessity for placing before the court the entire record of all evidence before the Commission. Since, however, the only possible controversy in this case—the controversy to which the case was narrowed on its initial hearing—arises under the "second" classification, where no possible state of the evidence could affect the determination, it seems clear that the presentation to the court of a complete record of all the deliberations of the Commission might justly vex the court because of unnecessary prolixity of the record and injure the litigants by amassing exorbitant cost bills.

Despite the seemingly clear irrelevancy of the transcripts, exhibits, correspondence and other data constituting the complete records of the several proceedings of the Commission, the district judge, at the request and pursuant to stipulation of counsel, ordered the transmission of these papers to the circuit court of appeals as a part of the record not incorporated in the transcript. Some of the rules of the circuit court of appeals bearing upon the propriety of such a course are as follows:

> XXXIV. Models, Diagrams and Exhibits of Material.—1. Models, diagrams and exhibits of material forming part of the evidence taken in the court below, and in any case pending in this court, on writ of error or appeal, shall be

placed in the custody of the marshal of this court at least ten days before the case is heard or submitted.

XIV. Writs of Error, Appeals, Return and Record.—4. Whenever it shall be necessary or proper in the opinion of the presiding judge in any circuit or district court that original papers of any kind should be inspected in this Court upon writ of error or appeal, such presiding judge may make such rule or order for the safe-keeping, transporting and return of such original papers as to him may seem proper; and this Court will receive and consider such original papers in connection with the transcript of the proceedings.

XXIII. Printing Records.—3. The clerk shall take to the printer the original transcript on file, but shall cause copies to be made for the printer of such original papers sent up under Rule 14, or other original papers, as are necessary to be printed.

The foregoing seem to show that Rule XXXIV refers to evidence outside a bill of exceptions which could not readily be incorporated therein, while Rules XIV and XXIII apply to evidence which, although not in the bill of exceptions, is printable and therefore might have been embraced therein. Rule XXIII further provides (2) that the Court may order the printing of portions of the record in addition to what has been printed.

It seems to petitioner that a reasonable interpretation of the afore-mentioned rules would avoid the

necessity of printing evidence of doubtful relevancy, unless the Court should find a necessity for some portion thereof and direct that such portion be printed.

BRIEF OF ARGUMENT.

1. *The Supreme Court will grant a writ of certiorari to review erroneous judgments of Federal appellate courts in respect to bills of exception.*

McDonald v. Maxwell, 47 Sup. Ct. Rep., 487.

In the above-cited case the Supreme Court of the District of Columbia had before it a record which, by fair construction, adequately presented the controlling issue of law. Nevertheless, in reliance upon the full measure of common-law requirements, the court declined to pass upon the merits because there was not a bill of exeeptions in the record.

Like the findings of fact and order of the Commission in the present case, however, there was in the record a report of a reference which adequately set forth the issue.

The Supreme Court of the United States granted a writ of certiorari and reversed the judgment of the intermediate court. In so doing the Supreme Court held that the report of reference was sufficient where, as in the present case, it appeared that no issue of fact had been decided by the trial court.

2. *In cases where juries have not been asked to determine issues of fact previously determined by the Commission, this Court has held that subsequent ju-*

dicial inquiry must be limited "to the ultimate question as to whether the Commission acted within its power."

Interstate Commerce Commission v. Union Pacific R. Co., 222 U. S., 541.

Illinois Central R. Co. v. Interstate Commerce Commission, 206 U. S., 441.

United States v. Louisville & Nashville R. Co., 235 U. S., 314.

In the case of Illinois Central R. Co. *v.* Interstate Commerce Commission, *supra*, this Court said:

> "The findings of the Commission are made by law *prima facie* true, and this Court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experience."

3. *Exhibits filed as evidence during the trial of a law case become part of the record without being embraced in a bill of exceptions.*

Copper River & N. W. Ry. Co. v. Reeder, 211 Fed., 280.

Dalton v. Moore, 141 Fed., 311.

Hobbs v. National Bank, 93 Fed., 615.

4. *The Commission's statement of facts and reparation order state the facts in sufficient detail and completeness for a judgment to be rendered thereon without supplementing evidence.*

Spiller v. A., T. & S. F. R. Co., 253 U. S., 117, 127, 131-2.

In the Spiller case, as in the present case, the parties had admitted the charges after the Commission had ruled upon the applicable law of the case. This was held an adequate showing of the material facts.

5. *The nature and scope of the court proceedings was fixed by the status of the findings and reparation orders at the time when the suit was filed in the district court.*

Minneapolis & St. Paul R. Co. v. Peoria & P. U. R. Co., 270 U. S., 580, 586.

6. *The action lies in tort and not contract, the actionable wrong being the illegal collection of unlawful charges.*

Louisville & Nashville R. Co. v. Sloss-Sheffield S. & I. Co., 70 U. S. (L. Ed.), 94, 101.

Louisville Cement Assn. v. I. C. C., 246 U. S., 638.

Phillips v. Grand Trunk R. Co., 236 U. S., 662.

7. *Regulations enforced by the Commission within the scope of its powers supersede the common law and have controlling force and effect.*

Western Union Tel. Co. v. Esteve Bros. & Co., 256 U. S., 566.

In the Esteve case the Court held that the form of contract for transmission of telegrams, approved by the Commission, controlled the rights and liabilities arising out of error in transmitting from New York to New Orleans a message which had been delivered to

the telegraph company in Europe on a blank sheet of paper.

It seems that a domestic practice generally enforced would be quite as controlling.

8. *The Commission had power to order a refund of the demurrage charges which in this case it ordered to be refunded.*

Turner Lumber Co. v. C. M. & St. P. R. Co., 271 U. S., 259.

9. *It had power to direct that the Federal agent refund charges the "collection or enforcement" of which was "in violation of the Interstate Commerce Act."*

Transportation Act of 1920, Sec. 206(c).

WHEREFORE, because of the errors in the record of this case and the vast importance of several of the questions involved therein, the petitioner respectfully urges this Court to issue a writ of certiorari for the purpose of bringing these important questions up for final determination.

BRENTON K. FISK,
Counsel for Petitioner,
NEW YORK, N. Y.

Pet. filed suit to recover $10,356 on a reparation order of ICC. At the close of all the evidence, both party moved for a directed verdict, and court without giving reasons thereof directed for Resp. The CCA affirmed on the ground that all the evidence was not in the bill of exceptions & Ct. would presume that omitted justified the direction.

Pet. insists this is error; Resp. defends on the merits [that there was only question of law, — power of Com. 274/91 to make order — and Mo. Pac. R. v. Merchants & Scott]

The charges in question were for demurrage [for lumber on loaders' shipments]. Cars originally had been made to certain points still unsold; after arrival at these points, it had been sold and shipper had ordered its reconsignment to other points. To these other points the railroads had, before the original consignment, placed embargoes [which were in their tariff] and consequently refused to make the reconsignments. When shipper refused to do anything more, demurrage accrued.

The holding of ICC was that there was no [Tr. 35] authority to collect these charges because the tariff publishing the reconsignment rules did not specify a prohibition against reconsignment to embargoed destinations.

The bill of exceptions shows that pets. offered in evidence exhibits numbered from 1 to 6 and resps. exhibits numbered from 7 to 12. Herein was this then recited in the bill of exceptions.

59 Tr. A

That the exhibits omitted consisted of evidence etc. and were wholly irrelevant.

Resp. depends on the merits

It argues Com. erred in its holding that the Reconsignment rules had application to prohibit to Embargoed destinations

(7)

They argue that Reconsignment is privilege not a right; that if it attaches at all, it is at the date of original consignment & subject to all the rights & liabilities ~~of~~ ~~regular consignments~~ of it is as all one shipment. It is clear that shipper may require to ship an original consignment to an Embargoed destination & collect demurrage. In fact he cannot ship to an Embargoed destination unless it is in tariff. Certainly the same rule should apply to a Reconsignment where at time of original Embargo was in effect.

Complaint
Demurrer - overruled
General issue in plea
Evidence
Ltr offer in evidence
by pltf(pet) Evidence explained 51
by deft(resp) - explained 58
Objection thereto by pet "A" 58
Jury directed verdict 54

It was followed by an order of the judge as follows:

Tr. 80

And this was followed by a stipulation of parties not to print the omitted documents in bill of exceptions

CCA said:

1. While an order of ICC is prima facie evidence of facts therein stated, it is subject to rebuttal in a Court where all the issues are open. And the CCA may review.

2. The evidence here sent up in original documents apparently consists of all the evidence on the hearing before the Commission [redacted] so that it should not be presumed allowed nisi have been granted. The rule permitting sending up of original papers was never intended to have the expense of printing. So it results that the bill of exceptions does not contain all the evidence on which the case was tried. Under such circumstances, we can only presume that that omitted justified the instruction + so affirm.

Pltf. mainly argues that the court misconceived the character of the case, believed it a question of fact, and consequently that evidence was necessary.

It says there was no question of fact, but a clearcut question of power to make the order. That the bill of exceptions was no more necessary than in MacDonald v Maxwell (April 11) 475. C 497.